

***United States Court of Appeals
for the Second Circuit***



APPENDIX

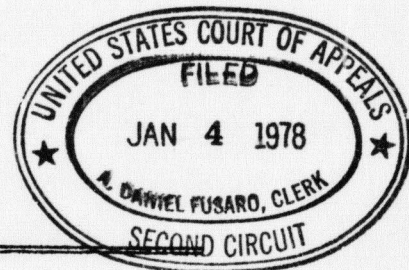
77-1068

To be argued by
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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:
UNITED STATES OF AMERICA, :
:
Plaintiff-Appellee, :
:
-against- :
:
BARBARA MEYERS, :
:
Defendant-Appellant. :
:
-----x

Bp/s
Docket No. 77-1068



SUPPLEMENTAL BRIEF AND APPENDIX
FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

BARBARA MEYERS,

Defendant-Appellant.

Docket No. 77-1068

SUPPLEMENTAL BRIEF AND APPENDIX
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This supplemental brief and appendix is submitted to provide this Court with two documents referred to in the main brief for appellant and to call the Court's attention to a matter regarding the representation of appellant by this office.

A. In Point II of appellant's main brief, in the footnote on page 35, appellant refers to the conduct in United States v. Steven Hyatt, ___ F.2d ___, Docket No. 77-1295, slip

op. 177 (2d Cir., November 1, 1977), and in United States v. Jose Nunez, ___ F.2d ___, Docket No. 77-1123 (2d Cir., June 23, 1977), of the former Assistant United States Attorney who prosecuted the case at bar. At the time appellant's brief was prepared, a transcription of this Court's oral opinion in Nunez was unavailable. We have since secured a copy, which confirms our recollection (as noted in the footnote) that Judge Mulligan was somewhat critical of the prosecutor's conduct, although he did not find reversal warranted. The opinion states: "The Government's summation, while not a model of propriety, in view of our prior holdings, did not reach that degree of outlandish behavior that warrants a reversal here." A copy of this Court's oral opinion in Nunez is "A" to the annexed supplemental appendix.

B. In Point III of appellant's main brief, in the footnote on page 36, appellant notes that the issue raised -- the interpretation of 18 U.S.C. §3651 as to the length of probation term authorized -- was presented to Judge Pratt, who presided below, in a Rule 35 motion filed in United States v. Jose Nunez, ___ F.2d ___, Docket No. 77-1123 (2d Cir., June 23, 1977). At the time appellant's brief was prepared, Judge Pratt had not ruled on that motion. We have since received a copy of Judge Pratt's decision denying the Rule 35 motion. The basis of Judge Pratt's decision is "the plain language of the statute." A copy of Judge Pratt's decision is "B" to the annexed supplemental appendix.

C. Appellant's main brief was prepared and filed before all the minutes of the proceedings below were available to appellate counsel; the scheduling order was amended once as a result of the delay in providing us with the minutes, but our brief was filed on November 25, 1977, despite the absence of several sets of minutes, on the advise of the Clerk of this Court. (In a letter filed with the brief, we noted that we were reserving the right to file additional papers if and when other minutes became available.)

On December 27, 1977, I received a copy of the minutes of July 16, 1976, in which appellant Barbara Meyer's trial counsel was relieved and arrangements for appointment of counsel in forma pauperis were discussed. In that colloquy, it is revealed for the first time on this record that Donna Chiarello, who was charged with stealing the checks in question, pleaded guilty and testified (in consideration for sentencing) against appellant, had been represented by an attorney associated with The Legal Aid Society.

Under normal circumstances, this office would not accept the appeal of a defendant against whom another client testified, for fear of conflict of interest. In this case, the potential conflict was discovered well after the appellate brief was filed, however. While bringing this fact to the Court's attention for whatever action this Court may deem appropriate, we respectfully offer our conclusion that there is no danger of conflict under the facts of these cases. First, Donna Chiarello did not appeal

from her conviction, and that case terminated well before our appointment to appellant Meyers' case. Second, although we summarize Mrs. Chiarello's testimony in our Statement of Facts, her testimony is of no consequence in any of the arguments we raise, which are limited to issues concerning the court's charge, the prosecutor's summation, and the sentence imposed. Third, at the time we prepared the brief in this case, we were unaware of any relationship with or duties owed to Mrs. Chiarello, and such factors were unavailable to diminish our wholehearted effort for appellant Barbara Meyers.

We note that Mrs. Meyers has at no time raised any question regarding this office's representation of her on appeal. We have advised her of this matter and anticipate no complaint, and we respectfully recommend that this office be permitted to remain as appellate counsel to Mrs. Meyers.

Respectfully submitted,

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Of Counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES,

Appellee

-v-

JOSE NUNEZ,

Appellant
-----x

Before:

HON: WILLIAM H. MULLIGAN, MURRAY I. GURFEIN and
ELLSWORTH A. VAN GRAAFEILAND, Circuit Judges

New York, June 23, 1977

STATEMENT MADE BY THE COURT AT DISPOSITION OF APPEAL
IN OPEN COURT.

JUDGE MULLIGAN:

Thank you, Mr. Barrett. We have read the briefs and we're familiar with the record here. We don't need to hear from the Government. We affirm the conviction.

Basically we believe that this was a question of fact which was fully presented to the trial judge at the suppression hearing. We find that Agent Vezeris' testimony, that the appellant stated that he understood the warnings and would answer the questions, involved a credibility finding by the court below. Appellant's conduct during the interrogation indicated that he had no problem with comprehension. The appellant also admitted that he had lived in the United States for eight years, and that his trial counsel had explained the concept of double jeopardy to him without an interpreter. He did have a New York driver's license - he was a superintendent of a building which did have English-speaking people. Further,

'appellant's statement that the agent who fingerprinted him was blonde - later corrected by him to a claim that the agent had brown hair - was found to be incredible. In any event, we think that basically, under the authorities, we have no choice but to affirm on that point. United States v. Wong, 431 U.S. 174 (1977).

Let me also say on the sentencing question, you are free to raise that below.

On the issue of prior similar acts, we think that this again was well within the discretion of the trial judge, sanctioned by Federal Rule of Evidence, 404(b), and as the Advisory Committee said: "No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making a decision." In short, the balancing is left to the sound discretion of the trial judge. Appellant admits that the evidence of a prior crime was admissible. The degree to which the proof can be elicited was within discretion of Judge Pratt.

The Government's summation, while not a model of propriety, in view of our prior holdings, did not reach that degree of outlandish behavior that warrants a reversal here. We think the evidence overwhelmingly establishes the guilt of the defendant, and we affirm the opinion.

JUDGE GURFEIN:

I just want to add that I think Mr. Barrett did a very good job, both on the brief and on the argument.

..... X

Plaintiff,

- against -

MEMORANDUM AND ORDER

..... X

Defendant argues that the imposed sentence is illegal since the four year period of probation exceeds the two and one-half month suspended portion of the three year sentence. He maintains that when ordering a "split sentence" under 18 USC §3651, a court must limit the term of probation to the length of the suspended portion of the sentence of incarceration.

The second paragraph of 18 USC §3651 provides that:

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best. (emph. supp.)

Contrary to defendant's argument, the plain language of the statute clearly indicates a congressional intent that the words "such period" relate to the subsequent words "as the court deems best," and not to the preceeding words, "the remainder of the sentence". Any possible doubt is removed by the identical language which Congress used in the first paragraph of §3651. Clearly, Congress intended in §3651 that if a court imposes probation, its length, as well as its terms and conditions (up to a maximum of five years), lie within the sentencing court's discretion.

For the foregoing reasons, as well as the others articulated in the government's memorandum of law in opposition to the motion, defendant's motion for correction of the sentence is denied.

SO ORDERED.

Dated: Westbury, New York
November 18, 1977.

A handwritten signature in dark ink, appearing to read "George C. Pratt", is written over a horizontal line.

GEORGE C. PRATT
U. S. DISTRICT JUDGE



CERTIFICATE OF SERVICE

December 30, 1977

I hereby certify that a copy of this ^{supplemental} brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Alan M. Berman